

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO.2040 OF 2004

In

SUIT NO.1644 OF 2004

Harisharan & Anr. : Plaintiffs

V/s.

M/s.Kawamin Pacific PTE Ltd. & Ors. : Defendants

...

With

NOTICE OF MOTION NO.1684 OF 2004

In

SUIT NO.1644 OF 2004

Harisharan & Anr. : Plaintiffs

V/s.

M/s.Kawamin Pacific PTE Ltd. & Ors. : Defendants

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Mr.G.Desai with Mr.M.V.Thakkar i/b. U. Ramadas for the
plaintiffs.

Mr.J.P.Sen i/b. Desai & Diwanji for defendant no.2.

Mr.K.Kaushik for defendant no.4.

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CORAM : J.N. PATEL, J.

August 5, 2004.

P.C.:

1. Heard the learned counsel for the parties.

2. The plaintiff has filed this suit seeking a limited relief of perpetual injunction restraining defendant nos.1 and 2 from receiving any amount by way of remittance from either of the plaintiffs and/or their bankers, viz., defendant no.4 and also from receiving any benefits thereunder from the Bill of Exchange dated 30.3.2004 and further restraining their bankers i.e. defendant no.4 from making any payment either under the Letter of Credit or under the Bill of Exchange which is annexed at exh.'D'. The suit is filed by seeking leave under Order II rule 2 of the C.P.C. for adjudication of all other rights between the parties in respect of the said transaction.

3. It is the case of the plaintiffs that they have imported consignment of newsprint by placing orders with defendant no.1 against open Letters of Credit and by executing Bill of Exchange in favour of defendant no.1.

4. According to the plaintiffs, defendant no.1 is a private limited company carrying on business of import and export of newsprints and other allied papers from various foreign countries and supplying and marketing the same to the parties interested in purchasing the same. Defendant

no.2 is a banking company and was acting as a banker of defendant no.1 whereas defendant no.3 is an insurance company which has insured the goods and defendant no.4 has given a Letter of Credit to defendant no.1. The whole suit of the plaintiffs is based on the contract i.e. Proforma Invoice (exh.'B'). It is the case of the plaintiffs that they have booked newsprints in Reels Ex Kruger, origin : Canada, substance : 36.6.GSM, RW: 40.5", Core:7.6 cms, Reel dia: 100 cms., the quantity of 100 MT vide contract no.KPPI-5751/03-04 on the terms and conditions as regards payment would be made through L/c. payable at 120 days from the date of bill of lading and indenture. In furtherance of this arrangement entered between the parties, the plaintiffs issued through their bankers Letters of Credit which expired on 25.3.2000. The Letter of Credit is annexed at exh.'C'.

5. It is the case of the plaintiff that the defendants, particularly defendant no.1 has induced the plaintiffs to issue the Letters of Credit on the assurance that they would supply to the plaintiffs newsprints of the description specified in the Proforma Invoice which is also supported by various documents, the particulars of which are furnished in paras 6 and 7.

6. According to the plaintiffs, in the course of inspection, on of the aforesaid goods so shipped by defendant no.1, the Mumbai customs authorities insisted upon breaking open the container in which defendant no.1 had shipped the goods on the vessel MCS "Brianna V.101 R" for the purpose of custom check and appraisal suspecting and doubting the bona fides of the said consignment and its contents and it is during the said inspection, check and observation that the plaintiffs found that the goods which defendant no.1 had shipped for the plaintiffs were not the contracted goods but the same were rough papers which could not be used for printing purposes at all and the same were not even properly and securely packed nor were wrapped in Kraft Papers as represented in the Bill of Lading issued by defendant no.4. It is further submitted that the goods came to be detained by the Customs authorities did not tally with the goods mentioned in any of the shipping documents but, in fact, were totally of different quality and description and, therefore, the plaintiffs were required to get the goods surveyed for ascertainment of their quality by defendant no.3, viz., M/s.Global Insurance Services Pvt. Ltd. The report of the surveyor is annexed along with the plaint as exh.'F'. Therefore, it is the case of the plaintiffs that defendant no.1 has despatched goods which were not of the

description ordered to be supplied with the sole purpose of cheating and defrauding the plaintiffs and in particular defendant no.1 intended to pass off waste papers as the contracted goods intending to illegally enrich itself by securing the benefits of the Letter of Credit which the plaintiffs had opened in its favour and that of defendant no.2 as well as of the acceptance of the Bill of Exchange representing the CIF value of the contracted goods and thereby put the plaintiffs to corresponding loss and damage. In order to prevent the defendants from encashing the Letters of Credit, the plaintiffs have taken out Notice of Motion 1684 of 2004 and obtained an ad-interim order in their favour from this Court on 28.6.2004.

7. In response to service of notice, defendant no.1 filed its appearance and took out Notice of Motion no.2040 of 2004 seeking stay of the suit. They have also sought for referring the matter to arbitration in terms of the contract dated 26.1.2004 and further sought quashing and setting aside the ad-interim order dated 28.6.2004 passed in Notice of Motion no.1684 of 2004.

8. This Court heard the learned counsel for the parties at length. The learned counsel for the parties have

almost relied upon the same authorities in support of their rival contentions on the point of intervention of the Court in matters of Letters of Credit and Bank Guarantee.

9. It was contended on behalf of the learned counsel for the plaintiffs that as fraud has been practised on the plaintiffs by despatching goods not in accordance with the orders placed with defendant no.1, the plaintiffs are entitled for an injunction to restrain defendant no.4 from honouring its commitment which is made in the Letter of Credit issued in favour of defendant no.2. It is submitted that defendant no.1 having defrauded the plaintiffs in inducing him to issue a Letter of Credit against supply of specific quality and quantity of newsprints failed to keep up its commitment and supplied certain waste papers which were not of the quality and standard for which orders were placed with defendant no.1 and this itself is sufficient to grant interlocutory order restraining the defendants from getting the benefit of the Letters of Credit.

10. The learned counsel for the plaintiffs drew the attention of this Court to the report of the surveyor to show that the goods inspected by the Customs authorities

which were got surveyed from the surveyor of the Insurance Company which has covered the goods for the purpose of shipment itself goes to show that what has been ordered and so represented in the various documents under which the goods were sent to the plaintiffs is enough to demonstrate a prima facie case in their favour.

11. The learned counsel appearing for the defendants submitted that the plaintiffs have obtained an ad-interim order by suppressing material facts from this Court i.e. the plaintiffs have suppressed from the Court a part of the contract entered into between the parties which is material for consideration of this Court in arriving at a decision as to whether this Court should entertain such a suit in view of the expressed agreement between the parties to refer the matter to arbitration. It is submitted that the general terms and conditions which form part and parcel of the agreement clearly provides for such a clause.

12. It is further submitted that the plaintiffs have come up with a case before the Court by misrepresenting that what has been supplied to them is rough paper which is not capable of use as newsprint. The learned counsel for the defendants has referred to the surveyor's report in order

to demonstrate that even if the surveyor's report is to be accepted, it does not mention that the consignment which has been sent to the plaintiff consists of rough paper. It may differ in colour and quality, but the surveyor has himself stated in his report that the newsprints are not rough paper.

13. After hearing the learned counsel for the parties and referring to the various authorities cited at the Bar which the Court for the present purpose does not feel it necessary to reproduce in this order, the parties have arrived at an arrangement that the plaintiffs would withdraw this suit and refer the matter for arbitration as per clause 11 of the general terms and conditions and till then the plaintiffs be directed to keep the Letters of Credit alive by extending the period of expiry and that defendant no.1 would not insist upon encashing the same for a stipulated period within which the plaintiffs would approach for referring the matter to arbitration at Singapore.

14. Therefore, in the opinion of this Court, even to make any prima facie observation as regards the merits of the rival contentions made before this Court whether the transaction is vitiated by fraud, and/or it would cause

irretrievable injustice to the plaintiffs. Therefore, this Court disposes of the two Notices of Motions by granting leave to the plaintiffs to withdraw the suit and take recourse to the remedy of referring the matter for adjudication by arbitration at Singapore.

15. The learned counsel for the plaintiffs submits that it would take at least eight weeks' time for the plaintiffs to prepare their case in furtherance of arbitration clause and invoke and take necessary steps for getting an Arbitrator appointed at Singapore to whom the dispute may be referred either by mutual agreement or taking recourse to the legal procedure which governs the matter at Singapore. In the meantime, the plaintiffs would extend the period of the Letters of Credit by so instructing their bankers i.e. defendant no.4 for a period of ten weeks. In the meantime, defendant nos.1 and 2 shall not invoke the Letters of Credit and would extend all co-operation to the plaintiffs in getting the matter referred before an Arbitrator.

16. All contentions raised by the parties before this Court are left open for being adjudicated by the Arbitrator before whom the disputes are being referred to as per the agreement between the parties. The two Notices

of Motions stand disposed of accordingly with liberty to the parties to approach this Court for any further order requiring to facilitate and then to act upon this arrangement or if any contingency arises.

17. It is made clear that this Court would not entertain any prayer made by the party for granting any further relief if it comes to a finding that the party who is seeking the benefit of such modification is at fault. Defendant nos.1 and 2 would not invoke the Letter of Credit for eight weeks from today.

18. In view of the above, the suit stands disposed of as withdrawn. Refund of Court fee as per rules.

19. Certified copy expedited.

20. Parties be given copies of this order duly authenticated by the Associate of this Court.

Sd/-

J.N. PATEL, J.